

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOLO, JR.
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NO. 89-513

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

LLOYD B. FISHER,

Petitioner,

v.

JUDGE JAMES J. KRAJEWSKI,

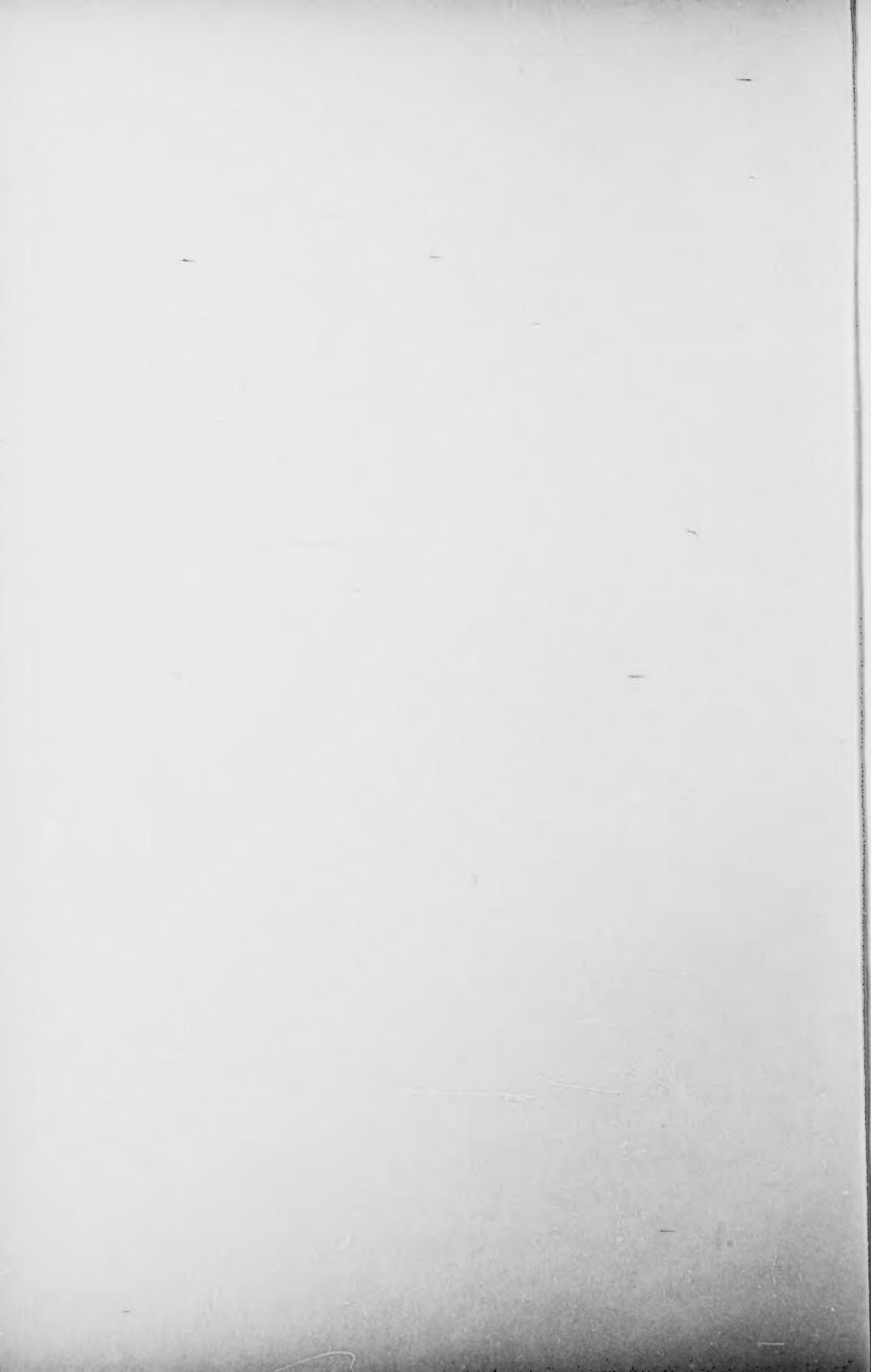
Respondent.

REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

1. Whether the Seventh Circuit Court of Appeals incorrectly relied upon F.R.A.P. 3(a) in stating its belief that it was appropriate to impose sanctions against Appellant and his counsel for their failure to strictly follow F.R.A.P. 10(b) and publicly reprimanding them by specifically naming them in the body of the Opinion and referring this case to the Indiana Disciplinary Board, without prior notice, and without a finding of bad faith, or a showing of prejudice to the Appellee in contravention of the law of other circuits and this Court.

i.

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A. Respondent's Brief In
Opposition fails to adequately
respond to Question No. 1 of
Petitioner's Petition. A
substantial portion of the
Brief focuses on matters only
relevant to Question No. 2.
Respondent totally fails to
mention FRAP 3(a), the rule
relied upon by the Seventh
Circuit in stating its belief
that it was appropriate to
impose sanctions on the
Appellant and his attorneys of
record. Respondent fails to
state one reason why FRAP 46(c)
should not apply in this case
and why Petitioner should not
be given prior notice and an
opportunity to show

cause why sanctions should
not be imposed.

B. For all the reasons stated
in Petitioner's Petition For
Writ of Certiorari, we urge
this Court to issue a writ.

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1.

I.

OPINIONS BELOW

Petitioner accepts the statement as presented in Respondent's Brief In Opposition.

II.

JURISDICTION

Petitioner relies upon the statement in his Petition For Writ of Certiorari.

III.

STATEMENT OF THE CASE

A. Nature of the Case

Contrary to Respondent's assertion, "the precise issue" . . . did not arise "from the opinion of the Seventh Circuit in which that court found that Fisher and his counsel had violated the Federal Rules of Appellate Procedure and imposed sanctions upon both Fisher and his counsel."

The Seventh Circuit specifically held:

Furthermore, we believe that it is appropriate, pursuant to Fed.

App. P. 3(a), to impose sanctions in the total amount of \$1,500.00 to be borne in equal measure by the plaintiff/appellant Attorney Lloyd B. Fisher and each of his attorneys of record on appeal, Gilbert King, Jr. and Macarthur Drake, for their failure to submit any part of the transcript of the lower court proceedings; failure to file a certification showing that they did not intend to do so; failure to notify the Appellee of their intention not to file the transcript, all in violation of Fed. R. App. P. 10(b). In addition, we refer this case to the Indiana Disciplinary Board for investigation, review and any action they deem appropriate under the circumstances.

B. Course of Proceedings Below

Petitioner relies upon the statement in his Petition For Writ of Certiorari under the heading "Statement of the Case." Further, the Petitioner would state that while it is true that he did not file a transcript of the proceedings, he did file a three hundred and sixty-two (362) page Appendix in which he referred to in presenting his argument to the Seventh

Circuit.

Petitioner accepts the statement of the Respondent except as to the specific holding of the Seventh Circuit which is mentioned herein in the previous section.

IV.

Statement of the Material Facts

Contrary to Respondent's assertions of "facts underlying the case in the District Court," there was no finding in the District Court or the Seventh Circuit relative to the Respondent's reasons for terminating the three Public Defenders, one of which was the Petitioner herein, nor were there any findings relative to any scams involving the Respondent's predecessor and the court. More importantly, not only were there no findings, but there was no evidence presented which tied the Petitioner to any of these assertions.

There was no finding by the District Court or the Seventh Circuit that the Petitioner was late, as asserted by the Respondent.

REASONS FOR GRANTING THE WRIT

V.

SUMMARY OF THE ARGUMENT

A. Respondent's Brief In Opposition fails to adequately respond to Question No. 1 of Petitioner's Petition. A substantial portion of the Brief focuses on matters only relevant to Question No. 2. Respondent totally fails to mention FRAP 3(a), the rule relied upon by the Seventh Circuit in stating its belief that it was appropriate to impose sanctions on the Appellant and his attorneys of record. Respondent fails to state one reason why FRAP 46(c) should not apply in this case and why Petitioner should not be given prior notice and an opportunity to show

cause why sanctions should not be imposed.

B. For all the reasons stated in Petitioner's Petition For Writ of Certiorari, we urge this Court to issue a writ.

VI.

ARGUMENT

A.

Initially, it is important to point out that the Respondent in his Brief in Opposition to the Petition For Writ of Certiorari virtually ignores the issue that he was required to address. He has completely failed to mention FRAP 3a which the Seventh Circuit relied upon in its opinion in suggesting that the imposition of sanctions was appropriate. Secondly, he contends that Petitioner made misrepresentations of the record, yet he fails to point to any place in the opinion wherein the Seventh Circuit made such a

finding. Thirdly, he spends a significant amount of time addressing the second issue in Petitioner's Writ, virtually ignoring the request to respond to Question 1. Fourthly, he ignores the Seventh Circuit's failure to utilize the provision of FRAP 46c which by its terms is specifically designed to deal with "conduct unbecoming a member of the Bar" or "for failure to comply with the rules of appellate procedure." Fifthly, the Respondent, in his Brief In Opposition, concedes that there is no precedent for the precise sanction for the specific rule violation in this case, which, in itself, provides another reason why a writ should issue in this case.

The litany of cases cited by the Respondent from other circuits that have imposed sanctions "for other, but similar, failures to follow the Federal Rules of

"Appellate Procedure" are both factually and legally distinguishable and therefore not dispositive of the precise issue before this court.

For example, some of the cases dealt with failure to file a brief or submitting a brief that made no attempt to address the elements requisite to obtain reversal. See In re: Hanson, 572 F2d 192, 193 (9th Cir. 1977); United States v. Buck, 797 F2d 536 (7th Cir. 1986); In re Tatum, 587 F2d 683, 684, (5th Cir. 1979); Olympia Company, Inc. v. Celotex Corp., 771 F2d 888 (5th Cir. 1985). A brief was filed in this case and there was no findings by the Seventh Circuit that the brief failed to address the elements requisite to obtain reversal.

In other cases cited by Respondent, sanctions were imposed because of a specific factual finding, dissimilar to the case at bar. For example, the attorney's

conduct was negligent; See In re Disciplinary Action Curl, 803 F2d 1004 (9th Cir. 1982); or that there was a cavalier approach to the case. See Herzfeld & Stern v. Blair, 769 F2d 645, 647.

The Respondent, at page 11 of his Brief, cites Insurance Company v. Sweeney Corp., Maryland, 792 F2d 1137 for the proposition that a finding of bad faith is not a prerequisite before imposing sanctions which in that case was premised on 28 USC Section 1927. That argument completely ignores the fact that in that case the court found the appeal to be frivolous and that the party had demonstrated a reckless indifference to the merits of his claim. There was no such finding in this case. Moreover, the Seventh Circuit did not find that the Respondent was prejudice by any acts of the Petitioner. In fact, the Respondent

requested additional time to file his Brief and requested a copy of the transcript. The court granted him the additional time.

Contrary to Respondent's assertions, the court did not find that there had been a misrepresentation of the record or that, in oral argument, Petitioner's reasons for not filing the transcript were "lame excuses for his dereliction of duty."

Moreover, at least in the Fifth Circuit, a failure to comply with FRAP 10(b) may be considered a "minor infraction of the rules." See Gulf Water Benefaction Co. v. Public Utility Comm'n, 674 F2d 462, 466 (5th Cir. 1982), which indicates as follows:

The court finds that the failure to provide a complete record on appeal is not jurisdictionally fatal . . .

. . . .

The court is also mindful that the drastic sanction of dismissal

should not be imposed for minor
infraction of the rules. 9
Moore's Federal Practice, 9I
210.05 [1] at 10-26 N.16.

Petitioner is not advocating that a failure to comply with FRAP 10(b) is a minor infraction. This quote is for illustrative purposes only. However, we must note that, after thorough research, we can find no reported case in which the specific sanctions imposed in this case were levied for a violation of FRAP 10(b).

Respondent at pg. 14 of his Brief cites Toepfer v. Dept. of Transportation, 792 F2d 1102, [Fed. Cir. 1986]; Adamsons v. Wharton, 771 F2d 41, 43 -44 n. 4 [2nd Cir. 1985]; In re Universal Minerals, Inc., 755 F2d 309 [3rd Cir. 1985] for the proposition that a motion for sanctions or a request in a brief constitutes notice. First, these cases are factually distinguishable from the case at bar. In

Toepfer and Adamsons, supra, there was a finding that the appeal was frivolous. In Universal Minerals, Inc., supra, the sanctioned attorney refused to respond to repeated requests of the court to address certain jurisdictional issues. Secondly, none of these cases stand for the proposition asserted by the Respondent.

The literal reading of FRAP 46(c) clearly provides for disciplinary power by the Court of Appeals over attorneys who practice in their courts. It specifically provides:

"(c) Disciplinary Power of the Court Over Attorneys. A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, takey any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court."

In this case, the Petitioner and his counsel of record were not given reasonable notice and an opportunity to show cause why sanctions should not be imposed. More importantly, there was no finding by the court that the appeal was frivolous, lacked merit or was vexatious. Thus a summary imposition of sanctions of the character levied in this case was not warranted.

ARGUMENT

B.

For all the reasons stated in Petitioner's Petition For Writ of Certiorari, we urge the court to issue a writ. Moreover, the Respondent has totally failed to demonstrate either legally or factually why a writ should not issue.

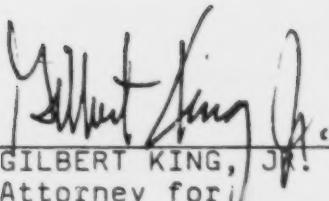
VII.

CONCLUSION

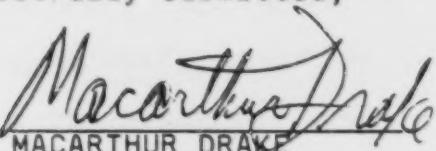
For all the foregoing reasons, and because this case apparently is one of

first impression, we respectfully urge this Court to grant a writ of certiorari in order to clarify the standards for the imposition of sanctions for a violation of the appellate rules.

Respectfully submitted,



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